In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1294

LOUISVILLE AND NASHVILLE RAILROAD COMPANY,
PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

Petitioner's reply memorandum correctly points out an error in our memorandum in opposition. We stated there that petitioner had not contended in the district court or the court of appeals that the Commission's conciliation efforts were inadequate in this case, and therefore did not discuss the contention. The fact is that petitioner made the contention in both courts.

Though the issue is properly before this Court, it does not warrant review. Petitioner's contention here, as in the court of appeals, appears to be that the Commission failed to engage in good faith conciliation efforts and therefore that the statutory conditions precedent to the filing of a civil action were not satisfied.

Section 706(b) of the Act, 42 U.S.C. (Supp. III) 2000e-5(b), directs the Commission—upon a finding of reasonable cause to believe that a charge of unlawful employment practice is true—to "endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." The only precondition to the filing of a civil action under Section 706(f)(1), however, is that "the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission" (42 U.S.C. (Supp. III) 2000e-5(f)(1)). In our view, that precondition is satisfied if the Commission has made some effort through conciliation to obtain a satisfactory agreement with respondent. If no such agreement has been reached, the statute does not contemplate judicial review of the adequacy of those efforts.

Since it is undisputed that conciliation efforts were made in the present case and that no acceptable agreement was secured, the jurisdictional prerequisites to the filing of this action were satisfied.

Even assuming that the adequacy or good faith of the Commission's conciliation efforts are a proper subject of judicial review, however, the court of appeals here correctly found that petitioner's challenge to the adequacy of those efforts "is simply not supported by the record" (Pet. App. 31). That factual determination does not warrant review by this Court.

In *Brennan* v. *Ace Hardware Corp.*, 495 F.2d 368 (C.A. 8), on which petitioner relies, the court of appeals found that the Secretary of Labor's conciliation efforts under the Age Discrimination in Employment Act were insufficient to satisfy the statute's precondition to the filing of an action. That Act provides that "[b]efore instituting any ac-

tion under this section, the Secretary shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion" (29 U.S.C. 626(b)). The court of appeals undertook to review the adequacy of the Secretary's efforts to secure voluntary compliance,[1] and it found the efforts inadequate because the compliance officer failed to suggest to the employer that back pay should be provided to the injured applicants, neglected to inform the employer that the file would be referred to the Secretary for possible legal action, and did not give the employer an opportunity to respond to the charges (495 F.2d at 375-376).

We doubt the correctness of the decision in *Ace Hardware*, but it is not, in any event, inconsistent with the present decision. Though the conciliation requirements of the two Acts are similarly (but not identically) worded, their enforcement schemes are different. Compare 42 U.S.C. (Supp. III) 2000e-5 with 29 U.S.C. 626. What may be required in the way of conciliation is not necessarily identical under the two statutes. In any event, petitioner's claim of a conflict rests, at bottom, on its characterization of the Commission's efforts to obtain voluntary compliance in this case as one of adamant resistance to conciliation (Pet. 17), a characterization that the court of appeals correctly rejected as without support in the record.[2]

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[1]The Secretary did not argue in that case that such review would be inappropriate under the Act. We are unaware of any decision by a court of appeals in which that issue was expressly considered and decided.

[2]The Secretary of Labor's field operations handbook for compliance officers, which was introduced into evidence in *Ace Hardware*, provided that the employer should be informed when the case file is referred to the Secretary for possible litigation. EEOC's internal procedure manual provides that no interested party should be informed when the case is referred to the Commission with a recommendation for litigation. That difference in operating procedure by the two enforcing agencies hardly requires resolution by this Court. Either approach might in a particular case advance (or threaten) the prospects of voluntary compliance, and each agency is entitled to follow the course that seems best in light of its experience in administering its Act.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

ABNER W. SIBAL,
General Counsel,
Equal Employment Opportunity Commission.

JULY 1975.